Supreme Court, U.S.
FILED

No. 95-753 NOV 9 - 1995

OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Leland Russell, et al.,
Petitioners,

v.

Sherry Ann Hiltz,
Respondent.

On Appeal to the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Counsel for Petitioners
Daniel R. Shinoff
Jack M. Sleeth, Jr.
Stutz, Gallagher, Artiano,
Shinoff & Holtz
401 West "A" Street
15th Floor
San Diego, California 92101
(619) 232-3122

QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals erred when it overturned the District Court's ruling that the earlier state court action barred suit in the federal court under the doctrine of res judicata and the statutory requirement that state court decisions have full faith and credit in the federal courts.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LELAND RUSSELL, ET AL.,
Petitioners

v.

SHERRY ANN HILTZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Leland Russell, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

LIST OF PARTIES

Sherry Lynn Hiltz as plaintiff/respondent in this court.

Stutz, Gallagher, Artiano, Shinoff & Holtz, Counsel for defendants/petitioners, Leland E. Russell, Carol Rodriguez and MiraCosta Community College District.

OPINION

The opinion of the Ninth Circuit Court of Appeals is in Appendix "A". It was an unpublished opinion.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was filed August 15, 1995. A motion for reconsideration was filed and denied on August 15, 1995. Jurisdiction is available under 28 U.S.C. § 2101(f).

The decision of the Ninth Circuit Court of Appeals is in direct conflict with its own prior decisions and in direct conflict with the law on res judicata in the State of California. The court has departed from the usual course of judicial proceedings and there is a need for this Court to exercise its supervisory powers.

STATUTES

The Ninth Circuit Court of Appeals failed to give full faith and credit to the prior decision of the Superior Court of the State of California. Section 1738 of Title 28 of the United States Code is implicated in this matter.

I.

STATEMENT OF ISSUE PRESENTED FOR REVIEW BY THE NINTH CIRCUIT COURT OF APPEALS

Whether the District Court properly held that appellant Sherry Ann Hiltz (hereinafter "Hiltz") was barred, by the doctrine of res judicata, from maintaining her Federal Court action since she had previously asserted the same primary rights in a petition for writ of mandate filed and heard in state court.

STATEMENT OF THE CASE

A. Procedural Background–State Court Action

Hiltz is a former print shop technician for the petitioner MiraCosta Community College (hereinafter "College"), who alleges she suffered a work-related injury that precluded her from returning to work. By

November 15, 1991,[1] Hiltz had used all available leave. (CR-5, Exhibit "A", Petition for Writ of Mandate, page 1, line 24-page 2, line 7).

As required by California Education Code § 88192 and the College's own policies, it terminated and placed Hiltz on a 39-month re-employment list. (CR-5, Exhibit "A", Petition for Writ of Mandate, page 1, line 24-page 2, line 7). Hiltz filed a grievance with the College arguing that she was entitled to a pre-termination hearing and a one-year leave of absence. When the College denied her grievance, Hiltz filed a Petition for Writ of Mandate in San Diego Superior Court on February 13, 1992. (CR-5, Petition for Writ of Mandate).

Hiltz argued in her Declaration in Support of Writ of Mandate that (1) prior to her termination she was discriminated against on the basis of her gender when she was passed over for advancement; (2) her request for leave without pay was denied and she was terminated on petitioner Leland E. Russell's (hereinafter "Russell") recommendation; and (3) the College had a practice of allowing long-term employees to take leave without pay after all other leave had been exhausted. (CR-5, Exhibit "A", Petition for Writ of Mandate, pages 6-10). Hiltz further stated, in her petition, that she "had filed a charge with the Department of Fair Employment and Housing regarding sex discrimination and discrimination based on medical condition." (CR-5, Exhibit "A", Petition for Writ of Mandate, page 5, lines 25-27).

In Hiltz' prayer, she requested: a preemptory writ of mandate directing the college vacate its termination; reinstate Hiltz; or alternatively, to permit Hiltz to file a grievance and to direct the college to process the grievance. (CR-5, Exhibit "A", Petition for Writ of Mandate at page 16.)

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[1] All cites are to the Civil Docket for Case No. 92-CV-1778.

On May 4, 1992, The Honorable Ronald L. Johnson of the San Diego Superior Court denied Hiltz' Writ of Mandate with prejudice, holding in part:

> . . . The district had a mandatory duty pursuant to Education Code 88192 to terminate petitioner upon the exhaustion of her available leave and place her on the re-employment list for 39 months. Further, petitioner's allegation that the board had an unwritten policy of granting leaves without pay is not supported by the weight of the evidence and is refuted by the declaration of Carrie Ziemack, the Director of Personnel Services for the District.

(CR-5, Exhibit "B").

Hiltz' Motion for Reconsideration was denied on May 29, 1992, for failure to state new facts. Hiltz did not choose to appeal the state court decision.

B. **Procedural Background--Federal Action**

On November 16, 1992, Hiltz filed an application for leave to present a late claim with the College for her claim for personal injuries and also a claim for contract damages. On the same date, Hiltz filed a Federal Court action setting forth causes of action under Title VII: Employment Discrimination--Sex; Title VII Employment Discrimination--Physical Handicap; Breach of Contract; Breach of the Implied Covenant of Good Faith and Fair Dealing; Intentional Infliction of Emotional Distress; Negligent Infliction of Emotional Distress; Interference With Economic Relations; Civil Conspiracy; Employment Discrimination--Sex; Employment Discrimination--Physical Handicap; and Discharge in Violation of Public Policy. (CR-1, Complaint).

Because Hiltz' Complaint raised the same issues as alleged in her Petition for Writ of Mandate in state court, the College filed a motion to dismiss the federal action on

the ground that it was barred by the doctrine of res judicata. (CR-3 through CR-5, the College's Notice of Motion, Motion and Notice of Lodgment).

C. **Ruling of The District Court**

On May 3, 1993, The Honorable Rudi Brewster granted the College's Motion to Dismiss. In so doing the district court stated to Hiltz' counsel:

> ...the concern I have here is that, as I understand it, your writ of mandate specified that they were raising issues of breach of employment contract, discrimination, disparate treatment. She may not have actively pursued them, but those were in the petition for writ of mandate. (CT at page 4, lines 8-13, attached hereto; emphasis added).
>
> ***
>
> ...I think the Takahashi case is very, very much in point. The Takahashi case is almost exactly the same facts, and it was held that it was barred by res judicata.
>
> I think this case is barred by res judicata. (CT at page 8, lines 21- 25, attached hereto).

Further, the court's Order Granting Defendant's Motion to Dismiss With Prejudice states:

> The court finds that principles of res judicata as developed by the Ninth Circuit in Takahashi v. Board of Trustees of Livingston Union School District, 783 F.2d 848 (9th Cir. 1986), and Clark v. Yosemite Community College District, 785 F.2d 781 (9th Cir 1986), establish that plaintiff's claim is barred by res judicata. (CR-15, page 1, line 25 - page 2, line 2).

D. **Ruling of The Ninth Circuit Court of Appeals**

The Ninth Circuit Court of Appeals found that:

> "Hiltz, however, sought a writ of mandamus in state court for the limited purpose of ordering the District to grant her a grievance hearing regarding her employment termination, rather than pursuing her gender and physical disability discrimination claims relating to conduct which allegedly occurred before termination."

Court's opinion at page 3. The court went on to state that the "harassment and promotion claims implicate a separate primary right from the termination claim addressed in the writ of mandate." Court's opinion at page 3. Respondent is thus free to pursue her harassment and promotion claims.

The issue is not the "purpose" of the Petition. The issue is what was raised by Hiltz in the state court action and what is now precluded. As Judge Brewster found, the state court action involved issues on discrimination, breach of employment contract, and disparate treatment.

II.

THE DISTRICT COURT PROPERLY RELIED UPON THE TAKAHASHI AND CLARK DECISIONS IN RULING THAT HILTZ' ACTION WAS BARRED BY THE DOCTRINE OF RES JUDICATA

A. **Summary of Argument**

The Ninth Circuit Court of Appeals ignored its own law and erred in permitting Hiltz to pursue claims of discrimination where those claims had already been raised in a prior state court action. Hiltz brought a Petition for Writ of Mandate in San Diego Superior Court seeking an

order the College vacate its decision on termination, and reinstate Hiltz or allow a grievance process, alleging the decision violated College practices and was discriminatory. The Petition for Writ of Mandate raised issues of alleged discrimination during employment, including Hiltz being passed over for promotion. The District Court found Hiltz' entire complaint was barred by res judicata.

The Ninth Circuit Court of Appeals ignored the facts alleged in the state action and ruled it had been brought for the limited purpose of seeking a grievance process. However, the issue is not what the purpose of the state action was, but what facts were raised and are now thereby subject to res judicata. The Ninth Circuit Court of Appeals should be ordered to reinstate the decision of the District Court.

B. Claim and Issue Preclusion

In Kremer v. Chemical Construction Corp., 456 U.S. 461, 466 (1982), the United States Supreme Court defined res judicata as a "final judgment on the merits of an action [which] precludes the parties or their privities from relitigating issues that would or could have been raised in that action." Similarly, 28 U.S.C. § 1738 provides that "the . . . judicial proceedings of any court of [a] state . . . shall have the same full faith and credit in every court in the United States . . . as they have by law or usage in the courts of such state." Accordingly, the principles of claim and issue preclusion are applicable to Federal civil rights actions. Allen v. Miccurry, 449 U.S. 90, 101 S.Ct. 411 (1980).

State law determines the scope of preclusion, provided that the prior state court decision was on the merits and the party against whom the doctrine is asserted had a full and fair opportunity and incentive to litigate the matter at issue. Migra v. Warren City School District Board of Education, 465 U.S. 75, 104 S.Ct. 892 (1984); Takahashi v. Board of Education, 782 F.2d 848 (9th Cir. 1986).

> Under California law, "[a] valid judgment on the merits in favor of the defendants serves as a complete bar to further litigation of the same cause of action." (Citation omitted.) To determine the scope of causes of action, California courts employ the "primary right theory". Under this theory, "the violation of one primary right gives rise to a single cause of action." (Citation omitted; emphasis added).

Takahashi, supra, 783 F.2d at 851.

C. **The Takahashi Decision**

In Takahashi, supra, a high school teacher, received a notice of accusation alleging that cause existed for her dismissal because of her failure to maintain a suitable learning environment. Plaintiff requested a hearing on the charge. The hearing commission concluded that the plaintiff was incompetent and ordered her dismissal. Plaintiff filed a proceeding in mandamus in the California Superior Court to compel the commission to set aside the decision. After receiving an adverse judgment, plaintiff appealed to the Fifth District Court of Appeal of the State of California which found (1) plaintiff had no right to reinstatement based on the College's failure to evaluate her performance pursuant to California Education Code § 44609 and (2) substantial evidence supported the trial court's finding that cause existed for her dismissal.

Plaintiff then filed an action in federal court alleging that the College (1) terminated her on account of her gender and ethnic origin; (2) terminated her on the basis of an impermissibly vague requirement, and (3) employed methods of evaluating her job performance different from those employed to evaluate the job performance of those similarly situated.

Upon motion of defendants, the District Court dismissed plaintiff's Complaint on the ground that her

action was barred by the doctrine of res judicata. In upholding the District Court decision, the Ninth District Court of Appeal stated, in part:

> In the present action, the identical primary right--the contract right to employment--is at stake. In determining the primary right at stake, the significant factor is the harm suffered. Absent termination of her employment contract, Takahashi suffered no harm. Takahashi's allegations of mental distress caused as a result of her dismissal do not present a separate injury. Rather, any such distress would be a consequence of the District's violation of Takahashi's primary contractual right. Consequential damages cannot support a separate cause of action. (Citation omitted). . . . While stating the primary right asserted in her first action in constitutional terms, Takahashi has failed to allege a new injury. "Where there are multiple legal theories upon which recovery may be predicated, one injury gives rise to only one claim of relief." (Citation omitted; emphasis added).

Like the plaintiff in Takahashi, Hiltz asserted the same primary right in both state and federal court--the contractual right to employment. While stating the primary right asserted in her first action in terms of "due process", Hiltz failed to allege a new injury. Since one injury only gives rise to one claim for relief, Hiltz' federal action was properly dismissed.

In any event, even if the Court found a primary right in the dismissal and another primary right in the discrimination alleged to have occurred prior to termination, both were raised in the state court and are barred.

D. **The Clark Decision**

In Clark v. Yosemite Community College District, 785, F.2d 781 (9th Cir. 1986), the plaintiff filed a petition for writ of mandate in a California trial court alleging defamation, denial of hearing on charges of misconduct, interference with the rights of union representation, punitive interference with teaching duties and violation of a purported right to be assigned to teach particular courses. The plaintiff subsequently brought his action in federal district court under 42 U.S.C. §§ 1983, 1985 and 1986, alleging a violation of his rights under the First, Sixth and Fourteenth Amendments. His amended complaint alleged defamation, due process violations, retaliatory interference with his teaching duties, and violation of a purported right to teach particular courses. The District Court granted defendant's motion for judgment on the pleadings ruling that the doctrine of res judicata precluded a claim alleging deprivation of the same primary rights previously litigated in the state mandamus proceeding.

The Ninth District Court of Appeal held that although it is commonly said that a judgment has preclusive effect only if it is on the merits, an opportunity to reach the merits is sufficient to invoke a preclusive effect. Although the state court did not expressly rule on the plaintiff's cause of action involving interference with his primary right to his teaching responsibilities, the plaintiff was not prevented from reaching the merits because of a procedural barrier which constituted an exception to the general claim preclusion. The court specifically held:

> If the state trial court failed to issue judgment on this cause of action, Clark's proper remedy was a motion demanding a definite ruling or pursuit of an appeal, not relitigation of the cause of action involving that primary right in another forum. Having apparently abandoned a cause of action on that primary right in the state proceeding, Clark may not seek to raise it

> again in a federal action. (Citation omitted).... Although Clark did not raise a section 1983 claim in the state proceeding, the doctrine of res judicata applies not only to those claims actually litigated in the first action but also to those which might have been litigated as part of that cause of action. (Citations omitted). . . . Furthermore, a claim involving federal constitutional rights may be joined in a California mandamus action. (Citation omitted). Indeed, California courts have expressly stated that a writ of mandate is an appropriate remedy for the enforcement of a civil right. (Citations omitted; emphasis added).

Id. 785 F.2d at 786.

In Clark, supra, the court, in dicta, stated that had plaintiff, in the state action, focused narrowly upon the derogatory material placed in his personnel file rather than the defendants' interference with his teaching duties, res judicata would not apply since "the right to proper administrative procedures regarding entry of information into his personnel file [was] not so inextricably intertwined with his teaching career concerns as to be merged into a single primary right." Id. 785 F.2d at 785. This, however, is not the situation in the case at bar. Hiltz' allegations, in state court, regarding discrimination and due process rights relating to her termination were "inextricably intertwined" with her career opportunities at the college. In any event, they were also raised in the state court action.

Further, it should be noted that in Clark, the court applied the doctrine of res judicata to bar plaintiff from maintaining his federal action since the plaintiff had argued in his motion for a preemptory writ of mandate and in memoranda in support thereof that the defendants not only had placed derogatory material in his personnel file, but also interfered with his teaching duties.

Likewise, Hiltz' Petition for Writ of Mandate and Damages and Declaration in Support thereof alleges that (1) In August of 1990, plaintiff was denied a promotion and that a male was hired to fill that position; (2) Appellee RUSSELL was behind the drive to terminate her; and (3) Hiltz had been discriminated against on the basis of her sex and medical condition. (CR-5, Exhibit "A", Petition for Writ of Mandate, pages 11-14). Such allegations are contrary to an assertion that the state court action was narrowly focused upon Hiltz' denial of a grievance proceeding.

E. **The District Court Properly Relied Upon the Takahashi and Clark Decisions.**

Hiltz' allegations in the federal complaint were all raised in the prior state action. In her Writ of Mandate, Hiltz alleged, in substance, that she was denied career advancement opportunities and discharged from her job, all due to gender and physical handicap discrimination. These allegations form the nucleus of Hiltz' federal claim. In sum, her federal action implicated the same primary rights as were raised in the state court proceeding.

At the state hearing, the College did argue that evidence regarding charges of gender and handicap discrimination were irrelevant and not before the court. There was no definite ruling by the state court on this matter. However, as set forth in Clark, above, Hiltz' proper remedy was a motion demanding a definite ruling or a pursuit of an appeal, not relitigation of the cause of action in another forum. Having apparently abandoned a cause of action on that primary right in the state proceeding, Hiltz could not properly seek to raise it again in a federal action. See, Casto v. Arkansas-Louisiana Gas Co., 597 F.2d 1323, 1326 (10th Cir. 1979) (where plaintiff includes multiple claims in suit, and drops one claim in silence, he may not, after judgment in that suit, maintain a separate suit on that dropped claim).

III.

AS HILTZ COULD HAVE FULLY ADJUDICATED HER CLAIMS IN THE STATE FORUM, HER FEDERAL CLAIMS ARE BARRED

In Clark, supra, the Ninth District Court of Appeal held that although it is commonly said that a judgment has preclusive effect only if it is on the merits, an opportunity to reach the merits is sufficient to invoke a preclusive effect. As the plaintiff was not prevented from reaching the merits of his federal action because of a procedural barrier which constituted an exception to the general claim preclusion, the court held that the doctrine of res judicata applied to bar those claims which might have been litigated in the state forum. Id. 785 F.2d at 786.

In Hiltz' Petition for Writ of Mandate she states: "Petitioner has filed a charge with the Department of Fair Employment and Housing regarding sex discrimination and discrimination based on medical condition." (C-5, Exhibit "A" at page 5, lines 25-27). In her accompanying declaration she states that her treatment at the College "constituted sex discrimination." (C-5, Exhibit "A" at page 7, lines 22). Hiltz never told the court that she was going to "pursue her discrimination claims administratively" as suggested in her Appellant's Brief. Rather, she lead the court to believe that it did have jurisdiction over her claims. (C-5, Exhibit "A", Petition for Writ of Mandate, page 5, lines 11-13). Further, Hiltz filed her claim with the Department over six months prior to the hearing on her writ. She was entitled to request that the Department issue a "right-to-sue" letter prior to the hearing date. Hiltz' failure to request a "right-to-sue" cannot prevent the proper application of res judicata.

IV.

CONCLUSION

The Ninth Circuit Court of Appeals has not followed the rule it previously laid down, and it has not announced a change in that rule. It has simply ignored its own rule, and left the opinion unpublished. An important part of Anglo-Saxon jurisprudence is the rule of Stare Decisis. A part of that doctrine is the importance of a settled, established rule of law. The ruling of the Ninth Circuit Court of Appeals has violated that rule to the substantial detriment of petitioners who must now retry a case already won in the state court on the same issues.

As discussed herein, Hiltz' federal court action involves the same issues as those raised in the state court. Hiltz had the opportunity in the state action to litigate all the theories of liability which she now asserts.

As such, the doctrine of res judicata acts as a bar to her from maintaining this action.

Respectfully submitted,

DATED: Nov 8/95

STUTZ, GALLAGHER, ARTIANO, SHINOFF & HOLTZ
A Professional Corporation

By: Daniel R. Shinoff
Daniel R. Shinoff
Jack M. Sleeth, Jr.
Attorneys for Petitioners LELAND E. RUSSELL, CAROL RODRIGUEZ and MIRACOSTA COMMUNITY COLLEGE DISTRICT

APPENDIX A

NOT FOR PUBLICATION

FILED
Jun 22 1995
Cathy A. Catterson
Clerk
U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHERRY LYNN HILTZ,	No. 93-55795
Plaintiff-Appellant,	D.C. No.CV-92-01778-B(CM
v.	
LELAND E. RUSSELL, In both his individual and official capacities; CAROL RODRIGUEZ, In both her individual and official capacities; MIRACOSTA COMMUNITY COLLEGE,	MEMORANDUM*
Defendants-Appellees.	

Appeal from the United States District
for the Southern District of California
Rodger C. McKee, Magistrate, Presiding

Argued and Submitted November 4, 1994
Pasadena, California

Before: GIBSON, ** HUG, and POOLE, Circuit Judges.

Sherry Lynn Hiltz appeals the district court's dismissal on res judicata grounds of her gender and physical disability discrimination action against her former employer Mira Costa Community College District and other individuals (collectively "the District"). Hiltz alleged that she was harassed during her employment, denied a promotion, and terminated in violation of

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Floyd R. Gibson, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988) ("Title VII"), the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111 to 12117 (Supp. III 1989-1992) ("ADA"), and the California Fair Employment and Housing Act, Cal. Gov't Code §§ 12900 to 12996 (West 1992) ("FEHA"). We affirm in part, and reverse and remand in part.

We review de novo a district court's dismissal of an action based upon res judicata. Palomar Mobilehome Park Ass'n v. City of San Marcos, 989 F.2d 362, 363 (9th Cir. 1993).

"Under the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738, 'a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.'" Takahashi v. Bd. of Trustees of Livingston, 783 F.2d 848, 850 (9th Cir.) (quoting Migra v. Warren City School Dist. Bd. of Education, 465 U.S. 75, 81 (1984)), cert. denied, 476 U.S. 1182 (1986). "To determine the scope of causes of action, California courts employ the 'primary right theory.'" Takahashi, 783 F.2d at 851. "Under this theory, 'the violation of one primary right gives rise to a single cause of action.'" Id. (quoting Slater v. Blackwood, 543 P.2d 593, 594 (Cal. 1975)). "[R]es judicata applies to judgments in [California] mandamus proceedings." Clark v. Yosemite Community College Dist., 785 F.2d 781, 784 n.1 (9th Cir. 1986).

Here, the district court ruled that Hiltz's federal action was precluded by res judicata based upon a prior state mandamus proceeding. Hiltz, however, sought a writ of mandamus in state court for the limited purpose of ordering the District to grant her a grievance hearing regarding her employment termination, rather than pursuing her gender and physical disability discrimination claims relating to conduct which allegedly occurred before her termination. Hiltz's harassment and promotion claims implicate a separate primary right from the termination claim addressed in the writ of mandate. See Clark, 785 F.2d at 785 (stating that college instructor's writ of mandate in a state court proceeding contesting school's administrative procedure for placing derogatory material in his personnel file did not implicate same primary right involving his claim of interference with his teaching career brought in subsequent federal action). Therefore, although res judicata bars Hiltz from relitigating the termination claim in federal court, res judicata does not bar Hiltz from pursuing her harassment and promotion claims in federal court. See id. at 787.

We decline to address Hiltz's argument regarding her FEHA claims. Such arguments are more appropriately addressed in the first instance by the district court. Each party shall pay its own costs.

AFFIRMED in part, and REVERSED and REMANDED in part.

APPENDIX B

FILED
Aug 15 1995
Cathy A. Catterson
Clerk
U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHERRY LYNN HILTZ,	)	No. 93-55795
	)	
Plaintiff-Appellant,	)	D.C. No.CV-92-01778-B(CM
v.	)	
	)	
LELAND E. RUSSELL, In both his individual and official capacities; CAROL RODRIGUEZ, In both her individual and official capacities; MIRACOSTA COMMUNITY COLLEGE,	)	ORDER
	)	
Defendants-Appellees.	)	

Before: GIBSON,* HUG, and POOLE, Circuit Judges.

The panel has voted to deny Appellant's petition for rehearing. Judges Hug and Poole have voted to reject the suggestion for rehearing en banc and Judge Gibson has so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

* The Honorable Floyd R. Gibson, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

APPENDIX C

FILED
Feb 9 1995
Cathy A. Catterson
Clerk
U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHERRY LYNN HILTZ,	)	No. 93-55795
	)	
Plaintiff-Appellant,	)	D.C. No.CV-92-01778-B(CM
v.	)	
	)	
LELAND E. RUSSELL, In both his individual and official capacities; CAROL RODRIGUEZ, In both her individual and official capacities; MIRACOSTA COMMUNITY COLLEGE,	)	ORDER
	)	
Defendants-Appellees.	)	

Before: GIBSON,* HUG, and POOLE, Circuit Judges.

The panel requests additional briefing on whether this appeal should be dismissed based upon appellant's apparent failure to exhaust her administrative remedies on the federal claims by obtaining a right-to-sue letter from the Equal Employment Opportunity Commission. See 42 U.S.C. §§ 200e-5(f)(1), 12117(a); Jones v. Bechtel, 788 F.2d 571, 572-73 (9th Cir. 1986). Counsel for the appellant shall file a supplemental letter brief of five or fewer pages in length within thirty days of the filing date of this order. The appellee's answering letter brief, if any, is due within thirty days of the service of the appellant's letter brief and shall not exceed five pages in length.

* The Honorable Floyd R. Gibson, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
Oct 10 1995
Clerk, U.S.
District Court
Southern District
of California
By G.Broas, Deputy

NO. 93-55795
CT/AG#: CV-92-01778-B (CM)

SHERRY LYNN HILTZ
Plaintiff - Appellant

v.

LELAND E. RUSSELL, In both his individual and official capacities; CAROL RODRIGUEZ, In both her individual and official capacities; MIRACOSTA COMMUNITY COLLEGE

Defendants - Appellees

APPEAL FROM the United States District Court for the Southern District of California (San Diego).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California (San Diego) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Filed and entered June 22, 1995

A TRUE COPY
ATTEST
AUG 22 1995

Clerk of Court

by: /s/
Deputy Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LELAND RUSSELL, ET AL.,
Petitioners

v.

SHERRY ANN HILTZ,
Respondent.

CERTIFICATE OF SERVICE

I, Daniel R. Shinoff, a member of the bar of this Court, hereby certify that on the 8th day of November, 1995, three (3) copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first-class postage prepaid, to:

Thomas R. Gill
Law Offices of Thomas R. Gill
10455 Sorrento Valley Road
Suite 203
San Diego, California 92121

counsel for the respondent herein. Further, I certify that a copy of the Petition for Writ of Certiorari in the above-entitled case was mailed, first-class postage prepaid, to:

U.S. District Court
The Honorable Rudi M. Brewster
940 Front Street
San Diego, CA 92101

and three (3) copies were sent to the United States Court of Appeals for the Ninth District for Justices Gibson, Hug and Poole, as follows:

The Honorable Gibson
The Honorable Hug
The Honorable Poole
United States Court of Appeals
For the Ninth District
121 Spear Street, 2nd Floor
San Francisco, California 94105

DATED: This 8th day of November, 1995.

STUTZ, GALLAGHER, ARTIANO,
SHINOFF & HOLTZ

By: Daniel R. Shinoff
Daniel R. Shinoff
Counsel for Petitioners